Filed 11/17/16 Kordestani v. ExxonMobil Oil Corp. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NADER KORDESTANI et al., Plaintiffs and Appellants, v. EXXONMOBIL OIL CORPORATION et al., Defendants and Appellants.	B257193 (Los Angeles County Super. Ct. No. BC519273)

APPEALS from orders of the Superior Court of Los Angeles County, Marc Marmaro and Cary H. Nishimoto, Judges. Reversed in part, dismissed in part.

Weitz & Luxenberg, Benno Ashrafi, Cindy Saxey, and Josiah Parker, for Plaintiffs and Appellants.

Horvitz & Levy, David M. Axelrad and Daniel J. Gonzalez; McKenna Long & Aldridge, Jaime C. Long and Frederic W. Norris; Armstrong & Associates, William H. Armstrong and Jennifer D. Fitzpatrick, for Defendants and Appellants.

In this asbestos-related personal injury case, plaintiffs Nader and Sherry Kordestani[1] appeal from the order dismissing their negligence claims against defendants ExxonMobil Oil Corporation and Exxon Mobil Corporation (collectively, Exxon). Exxon cross-appeals, challenging an earlier oral ruling denying its request to apply Iranian law to select issues of liability and damages. We agree with appellants that the trial court erred in concluding that the negligence claims already had been summarily adjudicated against them. We reverse the order of dismissal and remand the case for further proceedings. We dismiss Exxon's cross-appeal for lack of standing.

FACTUAL AND PROCEDURAL SUMMARY

In 2013, plaintiffs sued numerous defendants, alleging Kordestani suffered from mesothelioma due to exposure to asbestos. Exxon was named individually and as a successor in interest to Esso Research and Engineering Company, Standard Oil Company (New Jersey) (hereafter Standard Oil), and Socony Mobil Oil Company Inc. (also known as Socony Vacuum Oil Company, hereafter Socony). The complaint included claims for negligence, premises liability, strict product liability, joint venture, and alter ego. The relevant claims against Exxon arose from Kordestani's employment at the Abadan Oil Refinery in Iran, where he allegedly inspected or worked around asbestos-containing equipment and insulation between 1956 and 1980.

Early in the litigation, several defendants, including Exxon, moved to have Iranian law applied to issues of standard of care, strict product liability, allocation of fault, and damages. Judge Marc Marmaro denied the motion at a hearing in January 2014.

Exxon moved for summary judgment or summary adjudication of plaintiffs' claims of negligence, joint venture, alter ego, premises and strict product liability, as well as punitive damages. It cited undisputed evidence showing that the Abadan refinery was owned by the Iranian government through the National Iranian Oil Company, formed

[1] We refer to Nader Kordestani, the primary plaintiff, by his last name, and to his wife, Sherry Kordestani, whose claim is derivative, by first and last name as necessary to avoid confusion.

after the nationalization of Iran's oil assets in 1951. In 1954, an international consortium of eight oil companies, including Standard Oil and Socony, entered into an agreement with the Iranian government and the National Iranian Oil Company. Under the agreement, the consortium members incorporated Iranian Oil Participants, Ltd., a holding company, as well as two subsidiaries: the Iranian Oil Refining Company (IORC), which operated the Abadan refinery, and the Iranian Oil Exploration Production Company, which conducted exploration activities in Iran. The three companies were incorporated under Netherlands laws. Standard Oil and Socony owned seven percent of the holding company. Kordestani was employed by IORC.

In the motion, Exxon argued it was undisputed that each of the three companies incorporated pursuant to the consortium agreement maintained a separate corporate existence, and the consortium members played no role in the refinery's operations. Although the consortium members occasionally offered skilled workers to provide technical assistance to the operating company, the assistance was provided through direct employment of such workers by IORC. Exxon also argued it was undisputed that Kordestani did not come into contact with any products containing asbestos that were supplied by its predecessor in interest Esso International (hereafter Esso).

In opposition, plaintiffs chose, for purposes of the motion, not to contest a number of Exxon's undisputed facts, including whether the companies maintained separate corporate existence, whether the holding company played any role at the Abadan refinery, whether any employees of Exxon's predecessors worked at the refinery, and whether any products listed on invoices by Esso contained asbestos or were used at Kordestani's workplace. A Plaintiffs stipulated to the dismissal of their alter ego, joint venture, premises liability, and strict product liability claims. They argued, however, that the negligence, loss of consortium, and punitive damages claims should proceed to trial on two theories. The first was that the 1954 agreement with the Iranian government created a special relationship between the consortium members and the workers at the Abadan refinery. For this, plaintiffs relied on three provisions in the agreement: 1) that consortium members should "undertake the operation and management" of certain oil

properties; 2) that they "jointly and severally guarantee the due performance by the Operating Companies of their respective obligations" under the agreement; and 3) that one of the obligations of the operating companies "to Iran and NIOC" was "to conform with good industry practice and sound engineering principles applicable and appropriate to operations under similar conditions in conserving the deposits of hydrocarbons, in operating the oil fields and refinery and in conducting development operations. . . ." Plaintiffs construed these provisions to mean that consortium members guaranteed operation of the Abadan refinery in conformance with "good industry practice," which created a duty to ensure worker safety, and therefore workers were third party beneficiaries of the agreement.

Plaintiffs' second theory was based on a 1963 memorandum, which stated that, since 1958, "Jersey" had been responsible for "technical assistance on catalytic cracking" at the Abadan refinery. They also relied on a 1970 document, which referred to "Esso" as "the consortium advisers on cat. cracking" at the refinery. Plaintiffs argued that because Exxon's predecessors undertook to provide technical assistance as to the Abadan refinery's catalytic cracking unit, they had a duty to do so in a manner that avoided preventable injuries, such as asbestos dust inhalation.

In March 2014, Judge Marmaro granted Exxon's motion for summary adjudication of plaintiffs' claims of alter ego liability, joint venture, premises liability, and strict product liability pursuant to the stipulation to dismiss those claims. He denied the motion as to the claims for negligence and punitive damages because Exxon had not addressed plaintiffs' "contract-based tort claim and technical advisor claim in the moving papers." He rejected Exxon's argument that it had no notice of these theories because they were not alleged in the complaint, noting they had been raised in discovery and should have been anticipated.

Exxon then moved in limine to preclude plaintiffs from presenting evidence in support of the two theories because they were not alleged in the complaint and failed as a matter of law. In its trial brief, Exxon asked for a preliminary determination that the

1954 consortium agreement did not create a special or third party beneficiary relationship as to Kordestani.

During the April 15, 2014 hearing on Exxon's motion, Judge Cary H. Nishimoto, to whom the case had been assigned for trial, was unclear whether plaintiffs' third party beneficiary claim sounded in tort or contract. Plaintiffs' counsel explained that their theory was that the agreement created a "special relationship" under *Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193 and a duty to protect Kordestani from foreseeable harm. In response to the court's comments that the issue of duty was "a tort issue. We're talking about a contract here," plaintiffs' attorney explained: "That's what we're—we're not claiming contract. We're not claiming contract. We're saying they had a duty." When the court asked whether plaintiffs alleged "third party beneficiary," counsel responded, "No," but then immediately added, "What we're alleging is they have a duty under the contract under negligence." Before turning to Exxon's counsel, the court summarized plaintiffs' position as follows: "They're not alleging third party beneficiary under a contract. They're alleging a tort duty." In response, Exxon's counsel expressed his belief that plaintiffs had withdrawn their "third party beneficiary" theory. After additional argument, the court denied Exxon's motion, finding a jury question based on Exxon's "tort duty" to employees.

Two days later, at a hearing on a separate motion in limine, seeking to prevent plaintiffs' witnesses from speculating about the entities that employed them, Exxon's counsel argued that Judge Marmaro already had adjudicated premises liability and "control-type issues," so that the only remaining issue was whether "a breach of contract-type claim could go forward." Exxon's counsel contended it could not because plaintiffs had withdrawn it. Plaintiffs' attorney explained that their theories of liability sounded in negligence and were based on the special relationship created by the consortium agreement with the Iranian government and the "supervising activities" undertaken by Exxon's predecessors at the Abadan refinery.

Judge Nishimoto initially took the position that plaintiffs' contract-based tort claim had been withdrawn and that their supervision-based theory sounded in "premises

liability, whether you call it negligence or otherwise." Plaintiffs' counsel reiterated that plaintiffs sought to impose tort liability on Exxon based on the consortium members' contractual duty to ensure that whoever controlled the refinery's premises did so "at a level of good industry practices." The court disagreed, stating: "[Y]ou're talking about negligence, whether it's premises liability or supervision or just a duty. From what I gather, if Judge Marmaro said that there was a tort duty for breach of contract, that has been eliminated by the withdrawal of the third party beneficiary claim. [¶] And if there was a premises liability that was adjudicated, that includes negligence because without negligence you can't prove a premises liability."

After a break, plaintiffs' counsel reaffirmed that plaintiffs were still pursuing the two theories Judge Marmaro had allowed to proceed to trial. Counsel then added a third theory based on the discovery of documents showing that Esso, Exxon's predecessor, "as a conduit for other defendants," had shipped asbestos-containing materials to the Abadan refinery. Counsel asserted that plaintiffs intended to pursue negligence claims "based on the contract, based on the conduct and based on the supplied materials." Counsel reminded Judge Nishimoto that the court had denied Exxon's earlier motion in limine, and that it would have an opportunity to rule on a nonsuit motion after plaintiffs presented their evidence.

Judge Nishimoto reasoned that because premises liability had been adjudicated, "the issue of negligence has been adjudicated across the board whether you call it negligence, premises liability, failure to supervise, failure to control, a contract tort duty or whatever. . . ." Plaintiffs' counsel asked the court to clarify whether it was granting a "motion for summary judgment today based on a [motion in limine] . . ." Exxon's counsel argued that Evidence Code section 310 allows the court to make a determination as a matter of law at any time. Judge Nishimoto responded: "It's a motion to determine the status of the theories that plaintiff is pursuing. And based upon all the information that I have, . . . [¶] . . . [t]here is no sufficient evidence for a duty. And you can breach a duty in various different ways, but they all come under the heading of premises liability,

whether you call it third-party beneficiary, breach of contract, simple negligence[,] premises liability, whatever."

The court gave plaintiffs time to seek a clarification from Judge Marmaro that his ruling did not prevent them from going forward on their remaining theories of negligence. Judge Marmaro denied plaintiffs ex-parte request for such clarification, restating his ruling that summary adjudication of the premises liability claim had been granted based on "the stipulation of non-opposition" and had been denied as to two negligence theories that Exxon's summary judgment motion had not addressed.

Back before Judge Nishimoto on April 23, 2014, plaintiffs' counsel restated what, by then, were three theories of negligence asserted against Exxon: (1) based on its predecessors' contractual guarantee that the Abadan refinery would be run according to good industry practices; (2) based on their undertaking to act as technical advisors to the catalytic cracking unit, and (3) based on Esso's participation in the distribution of asbestos-containing products and materials. The parties disputed whether there was evidence to support the last theory. Exxon's counsel also argued that a negligent product liability theory was precluded by the summary adjudication of plaintiffs' strict product liability theory.

Ultimately, Judge Nishimoto characterized plaintiffs' first two theories as negligence based on "third-party beneficiary on premises liability," and thus indistinguishable from the premises liability claim Judge Marmaro had adjudicated. In its final iteration, his ruling was that "A, there is no premises liability. That was adjudicated. B, there is no third-party beneficiary of duty here because of the same reason. And three, if it is true that you cannot have . . . a separate cause of action for negligence . . . if your cause of action for strict liability had been adjudicated, then what do you have left?"

The judge subsequently signed Exxon's proposed order to dismiss plaintiffs' complaint against Exxon. The order listed the following reasons for dismissal: the earlier "summary adjudication of certain claims," plaintiffs' statements that they were not pursuing Exxon on a "third party beneficiary breach of contract claim," the determination

that "there is no basis to support any duty not previously adjudicated," and the court's power to decide issues of law, such as the existence of duty, under Evidence Code section 310.

Plaintiffs appealed from the order of dismissal. Exxon cross-appealed in order to challenge Judge Marmaro's earlier choice-of-law ruling.

DISCUSSION

I

Plaintiffs challenge Judge Nishimoto's reasons for dismissing their negligence claims against Exxon. They argue the court incorrectly concluded these claims could not proceed because the premises liability and strict product liability claims already had been summarily adjudicated in Exxon's favor.[2] We agree.

The dismissal order resulted from a motion in limine that reargued issues decided at the summary adjudication stage.[3] Courts have recognized that in addition to raising evidentiary issues before trial, "motions in limine also can function as 'an objection to any and all evidence on the grounds [the] pleadings [are] fatally defective' for failure 'to state a cause of action.' [Citation.] In such cases, the in limine motion 'operate[s] as a general demurrer to [the] complaint or a motion for judgment on the pleadings.'

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[2] Plaintiffs do not challenge Judge Marmaro's summary adjudication of claims they had stipulated to dismiss. (See *Zapanta v. Universal Care, Inc.* (2003) 107 Cal.App.4th 1167, 1171–1172, citing *Cravens v. State Bd. of Equalization* (1997) 52 Cal.App.4th 253, 256 [summary judgment proper where claims dismissed without prejudice in lieu of timely opposition to summary judgment motion].)

[3] Some courts have expressed concern over the use of in limine motions to obtain reconsideration of orders denying summary judgment motions, but absent an objection have treated the procedural issue as forfeited. (See *Johnson v. Chiu* (2011) 199 Cal.App.4th 775, 780–781; but see *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 766 [rejecting plaintiff's contention that trial judge could not consider defendants' renewed collateral estoppel argument in a motion in limine where argument had earlier been rejected by law and motion judge].) Plaintiffs do not raise a procedural challenge on appeal.

[Citations.] 'Alternatively,' where such motions are granted 'at the outset of trial with reference to evidence already produced in discovery, they may be viewed as the functional equivalent of an order sustaining a demurrer to the evidence, or nonsuit.' [Citation.] 'A motion for nonsuit or demurrer to the evidence concedes the truth of the facts proved, but denies as a matter of law that they sustain the plaintiff's case.' [Citation.]" (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 951–952.) We review the court's determination of such a motion de novo, drawing all inferences and resolving all conflicts in the evidence in favor of the nonmoving party. (*Id*. at p. 952.)

Summary adjudication may be granted as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty. (Code Civ. Proc., § 437c, subd. (f)(1).) Such adjudication does not bar any remaining causes of action, affirmative defenses, claims for damages, or issues of duty, and no one may comment on the grant or denial of a summary adjudication motion to a jury. (*Id*., § 437c, subds. (n)(2) & (3).) The summary judgment statute precludes the "'piecemeal adjudication of facts that [do] not completely dispose of a substantive area.' [Citation.] . . . [E]ach cause of action, or substantive area, that is not summarily adjudicated is to stand on its own at trial." (*Raghavan v. Boeing Co.* (2005) 133 Cal.App.4th 1120, 1137 (*Raghavan*).) Because an order granting summary adjudication does not have preclusive effect on the remaining causes of action, claims, defenses, and issues of duty, the statute ensures that the summary adjudication does not affect the subsequent trial. (*Id.* at p. 1137, fn. 1.)

In *Raghavan*, *supra*, 133 Cal.App.4th 1120, the trial court summarily adjudicated the plaintiff's defamation cause of action, concluding that the accusations contained in a written reprimand issued by the plaintiff's employer were true. At trial, the employer moved in limine to preclude the plaintiff from litigating the truth of those allegations in connection with his remaining wrongful termination claims. The trial court granted the motion and instructed the jury that the statements in the reprimand were true. (*Id.* at p. 1134.) The Court of Appeal reversed the jury verdict for the employer, holding the instruction was given in error because the summary adjudication of the defamation cause

of action did not restrict the evidence the plaintiff could introduce at trial regarding the written reprimand for purposes of the wrongful termination cause of action. (*Id*. at p. 1134.) The instruction was prejudicial because it made it more likely that the jury would find the employer "issued the reprimand for legitimate disciplinary reasons" rather than in retaliation for the plaintiff's whistleblowing activity. (*Id*. at p. 1137.)

Here, Judge Nishimoto concluded that the adjudication of one issue of duty—the one giving rise to premises liability—precluded trial on any other issue of duty on the assumption that all negligence theories are the same and there is only one duty of care. That was incorrect.

"In considering whether a party has a legal duty in a particular factual situation, a distinction is drawn between claims of liability based upon misfeasance and those based upon nonfeasance. '"'Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention. . . .' [Citations.]"' [Citation.] Liability for misfeasance is based on the general duty of ordinary care to prevent others from being injured by one's conduct. [Citations.] Liability for nonfeasance is limited to situations in which there is a special relationship that creates a duty to act. [Citation.]" (*Seo v. All-Makes Overhead Doors*, *supra*, 97 Cal.App.4th at pp. 1202–1203.) While the common law concept of special relationships includes, among others, the relationship between a "'landowner or possessor and person coming on the land,'" a special relationship also may arise out of a statutory or contractual duty, or out of "a voluntary assumption of a duty upon which a person reasonably relies." (*Id*. at p. 1203.) "If a special relationship arises out of a contractual duty, the duty is owed not only to the parties to the contract but also to those persons intended to be benefited by the performance of the contract." (*Ibid*.)

Plaintiffs' principal theory was based on a special relationship between Exxon's predecessors and Kordestani, arising out of the consortium members' "guarantee" to the Iranian government that the Abadan refinery would be operated according to "good industry practices," of which Kordestani was allegedly a third-party beneficiary. Their

second theory was based on the Exxon predecessors' undertaking to provide technical advice on operation of the refinery's catalytic cracking unit, which, according to plaintiffs, gave rise to a duty to warn the operating company about the dangers of manipulating asbestos insulation.

Exxon's argument, in the trial court and on appeal, that plaintiffs abandoned these theories is not supported by the record. Exxon reads out of context the response plaintiffs' counsel gave to the court's question whether plaintiffs alleged "third party beneficiary" at the April 15, 2014 hearing. Although counsel responded in the negative, he immediately clarified his answer by stating, "What we're alleging is they have a duty under the contract under negligence." That response was consistent with counsel's argument at the hearing that the contractual duty created by the consortium agreement gave rise to a special relationship in tort under *Seo v. All-Makes Overhead Doors*, *supra*, 97 Cal.App.4th 1193. As counsel repeatedly explained, plaintiffs did not assert a breach of contract claim or seek contract damages; rather, they asserted a negligent breach of a duty arising out of contract. Thus, plaintiffs disclaimed a third-party beneficiary contract claim, not a third-party beneficiary tort claim. (See *Mariani v. Price Waterhouse* (1999) 70 Cal.App.4th 685, 699 [distinguishing between tort and contract rights of third party beneficiaries].)

Notably, Judge Nishimoto's final ruling was not based on a waiver by plaintiffs; rather, the judge considered plaintiffs' third-party beneficiary and consultation theories to be indistinguishable from premises liability. Exxon's proposed order, which purported to rely on "[p]laintiffs' statement that they are not pursuing [Exxon] in a third party beneficiary breach of contract claim," is inconsistent with that oral ruling if read to suggest that plaintiffs did not only disclaim a breach of contract theory, but also waived their contract-based tort theory. Assuming that in signing the order Judge Nishimoto accepted Exxon's waiver argument, the order is erroneous because it misrepresents plaintiffs' position in the trial court.

Exxon's trial counsel argued incorrectly that because premises liability requires proof of control of the premises, all "control-type issues" had been adjudicated. As we

have explained, summary adjudication does not result in piecemeal adjudication of facts that do not dispose of an entire cause of action. (*Raghavan, supra,* 133 Cal.App.4th at p. 1137.) While control may be a crucial element of premises liability (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1158), Exxon cites no authority for the proposition that it is essential to a special relationship based on a contract or on a voluntary undertaking to give technical advice. In fact, plaintiffs repeatedly argued that the issue of control over the refinery's operations was not essential to their claims, which were premised on the failure of Exxon's predecessors to share their knowledge of the dangers of asbestos.

Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal.4th 992, on which Exxon relies, is distinguishable. There, the court held there was no difference between "ordinary" and "professional" negligence because the "appropriate standard of care . . . remains constant irrespective of the terminology used to characterize it." (*Id.* at p. 997.) The case did not involve the issue of duty and does not support Exxon's argument that adjudication of one type of a special relationship adjudicates all types of special relationships and precludes finding a duty on any other basis. Similarly, Exxon was incorrect in arguing that a claim of strict product liability is indistinguishable from a claim of negligence, as those are "separate and distinct bases for liability." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101.) """[F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context."" (*Ibid.*, quoting *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112.)

Exxon argues that plaintiffs have no evidence that Esso, its predecessor, was involved in the distribution chain of products containing asbestos or that Kordestani encountered those products. The argument is misplaced. The record indicates the trial court assumed plaintiffs had such evidence, but concluded that the negligence claim was precluded by the summary adjudication of the strict product liability claim. On reviewing its order on the motion in limine, whether that motion was used as a functional equivalent of a motion for judgment on the pleadings or for nonsuit, we cannot resolve factual issues. (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.*, *supra,* 171 Cal.App.4th at p. 952.) Plaintiffs' concession of undisputed facts was limited to

Exxon's motion for summary adjudication of the claim of strict product liability. Since negligence and strict liability provide separate bases for liability, the summary adjudication of the strict liability claim does not result in an adjudication of any facts relevant to the remaining negligence claim. (See *Raghavan*, *supra*, 133 Cal.App.4th at p. 1137.)

To the extent Exxon claims it had no notice of plaintiffs' supply theory, plaintiffs disputed that contention, and their trial brief shows they intended to prove that various defendants, including Exxon, "negligently supplied . . . asbestos-containing products. . . ." There is no indication the negligence claim was dismissed based on any unfair surprise to Exxon. (See *Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1280–1281 [trial court has broad discretion to allow amendment unless "patently unfair"].) Nor can we make such discretionary findings for the first time on appeal.

Plaintiffs' burden on appeal is to show error. (*Ruelas v. Superior Court* (2015) 235 Cal.App.4th 374, 383.) They have met that burden by showing that the trial court dismissed their negligence claims against Exxon on the erroneous assumption that they were indistinguishable from claims that had been summarily adjudicated earlier. The written order states the court broadly determined that "there is no basis to support any duty not previously adjudicated," but the record does not show the court had considered the merits of plaintiffs' remaining theories separately from the previously adjudicated claims. Nor has Exxon argued that plaintiffs' three theories of liability are legally insufficient for any other reason, and we decline to construct arguments in its favor. (*Sciarratta v. U.S. Bank National Association* (2016) 247 Cal.App.4th 552, 560, fn. 6 [respondent's failure to address issue results in forfeiture].) We reverse the order of dismissal without expressing a view on the merits of plaintiffs' negligence theories.

II

A party has standing to appeal only if legally "aggrieved" by an appealable judgment or order. (Code Civ. Pro., § 902; see *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 977.) Exxon recognizes that it lacks standing to appeal from the order of dismissal because it is not aggrieved by that order. It

also recognizes that Judge Marmaro's pre-trial ruling denying Exxon's motion to apply Iranian law to standard of care, strict liability, joint liability, and punitive damages was not separately appealable. Although Exxon claims to be aggrieved by that ruling, it fails to show an injury that is "immediate," rather than a nominal or "remote." (*Crook v. Contreras* (2002) 95 Cal.App.4th 1194, 1201.)

Since plaintiffs no longer pursue a strict liability claim against Exxon, the choice-of-law ruling is partially moot. On the other hand, Exxon's exposure to joint liability and punitive damages is only a remote consequence of its potential liability in negligence. The choice-of-law ruling does not immediately result in any such liability, and it would be speculative to conclude that Exxon would be found liable for damages at all, let alone punitive damages, unless Iranian law is applied; the conclusion that it would not be found liable in negligence if Iranian standard of care is applied also would be speculative.

Notably, Exxon had not sought to apply the law of Iran to the preliminary determination of legal issues, such as duty, which is what Judge Nishimoto was asked to resolve during the hearing on the motion in limine. Our reversal of the order of dismissal does not mean that the issue of duty may not be outcome determinative on remand. Similarly, on the issue of punitive damages, Exxon argues for the first time in its cross-appeal, that California has no interest in imposing punitive damages for conduct that occurred out of state. (See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 421 [generally, state has no legitimate interest in imposing punitive damages for out-of-state conduct]; *Aguirre Cruz v. Ford Motor Co.* (W.D. Tenn. 2006) 435 F.Supp.2d 701, 705–706 [collecting cases holding plaintiff's state of domicile has interest in compensating plaintiff, not in punishing defendant].) That argument was not raised in the choice-of-law motion, and the determination whether California has a legitimate interest in imposing punitive damages may not necessarily require application of foreign law. Nothing prevents Exxon from challenging punitive damages on remand.[4]

[4] Plaintiffs suggest collateral estoppel would attach to the choice-of-law ruling on remand, but collateral estoppel applies in successive proceedings. (See *South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 660 ["Most commonly, issue

Because Exxon has not shown that it has standing to appeal the choice-of-law ruling, the cross-appeal is dismissed.

Exxon requests that we address the ruling even if we dismiss the cross-appeal. On plaintiffs' appeal, we may review "any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ." (Code Civ. Proc., § 906.) However, nonappealable orders or other rulings unrelated to the judgment or order appealed from are not reviewable under Code of Civil Procedure section 906. (*Lopez v. Brown* (2013) 217 Cal.App.4th 1114, 1136.) The choice-of-law ruling is unrelated to any issue covered in the order of dismissal.

Exxon argues we should review the ruling under Code of Civil Procedure section 43, which provides that on appeal from any judgment or order, "if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case." Even assuming that the term "new trial" has a very broad application (see *Wilson v. Shea* (2001) 87 Cal.App.4th 887, 893; *Stubblefield Construction Co. v. Superior Court* (2000) 81 Cal.App.4th 762, 765; *Hendershot v. Superior Court* (1993) 20 Cal.App.4th 860, 865), and that our reversal of the order of dismissal and remand for further proceedings may be characterized as a remand for a "new trial" on the merits of plaintiffs' negligence claims, we are not convinced that Code of Civil Procedure section 43 requires that we consider the issues raised on Exxon's cross-appeal after we dismiss it. Those issues are not presented upon plaintiffs' appeal from the order of dismissal, which is the only appeal properly before us. We decline to review them.

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preclusion arises from successive suits on different claims"].) Reversing the order of dismissal will reinstate the same proceeding, rather than give rise to successive proceedings. While the doctrine of law of the case prevents relitigation on remand of issues decided in a previous appeal in the same proceeding, the doctrine does not apply "to points of law that might have been determined, but were not decided" on appeal. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309.)

DISPOSITION

The order of dismissal is reversed, and the matter is remanded for further proceedings. Exxon's cross-appeal is dismissed. Plaintiffs are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.